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No. ____

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION FOR REVIEW

Whether the National Labor Relations Board erred in holding that a successor employer cannot conduct a poll to determine whether a majority of its employees support a union unless it already has obtained so much evidence of no majority support as to render the poll meaningless?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Allentown Mack Sales and Service, Inc.,[1] respectfully petitions the Supreme Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment enforcing an order of the National Labor Relations Board. In addition to Allentown Mack and the General Counsel, the parties in the Board proceeding included Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO. The union did not participate in the Court of Appeals proceeding.

OPINIONS BELOW

The Decision of the Court of Appeals is reported at 83 F.3d 1483, 152 L.R.R.M. (BNA) 2257 (D.C. Cir. 1996) (Appendix A). The Board's decision, including the Administrative Law Judge's decision, is reported at 316 N.L.R.B. 1199, 149 L.R.R.M. (BNA) 1051 (1995) (Appendix B).

JURISDICTION

The Court of Appeals issued its decision May 21, 1996. (App. 1.) The Court of Appeals denied Allentown Mack's Petition for Rehearing and Suggestion for Rehearing In Banc on September 13, 1996. (App. 65, 66.) On

[1] Allentown Mack is not publicly traded and has no parent or subsidiaries.

October 24, 1996, the Court of Appeals issued an Order granting Allentown Mack's motion for a 30-day stay of mandate. (App. 68.) The Supreme Court has jurisdiction to issue a writ of certiorari under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) and 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 7 of the National Labor Relations Act states, in part, that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any and all such activities." 29 U.S.C. § 157.

Section 8(a)(1) of the Act states that "It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

Section 8(a)(5) of the Act states that "It shall be an unfair labor practice for an employer – (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5).

STATEMENT OF THE CASE

Petitioner, Allentown Mack Sales and Service, Inc., was formed by three managers of Mack Trucks, Inc.'s dealership and repair shop in Allentown, Pa., to purchase the assets of the business. (App. 2.) Allentown Mack

hired 32 of the 45 employees previously employed by Mack Trucks, Inc. (App. 2.) Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO, had represented employees of Mack Trucks, Inc.'s sales and parts departments since 1973. (App. 28.)

During the period immediately before and after the sale, which was effective December 21, 1990, seven employees made unequivocal statements that they no longer supported the union. (App. 2, 52.) One of the seven also stated that the "entire night shift" (which consisted of six or seven employees) did not want the union. (App. 2, 51.) Another employee, Ron Mohr – who was a member of the union's bargaining committee and the shop steward for the service department, where 23 of the 32 employees worked – told management, "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." (App. 53.)[2]

The seven employees expressed rational reasons for no longer wishing to be represented. Thus, for example, Milt Solt thought that the union was a waste of $35 per month, the amount he paid in dues. (App. 50.) Joe McKilvie said he was against the union and that "we would work better without one." (App. 50.)[3]

On January 7, 1991, the new company received from the union a demand for recognition and bargaining.

[2] The Board refused to find that Mohr's observation regarding the service department employees' lack of union support created any doubt about the union's majority status.

[3] A number of other employees also made statements indicating that the union did not continue to enjoy majority support which the Board refused to count.

(App. 30.) On January 25, 1991, the company wrote back declining to enter into bargaining, "at least until further investigation," because it had a good faith doubt as to the union's continued majority support. The letter further stated that in order to ascertain the employees' views concerning the union, the company had arranged for an independent secret ballot poll to be taken on February 8, 1991. (App. 30.)

The company conducted a poll of the employees, supervised by a Roman Catholic priest. (App. 44, 58.) The results of the poll were 19 to 13, against the union. (App. 2, 44.) Based on the poll, the company withdrew recognition from the union after which the union filed unfair labor practice charges against the company. (App. 2, 43-44.)

The Board found that although the poll was conducted in a lawful manner,[4] the company was not entitled to conduct the poll in the first place because it did not have "a reasonable doubt, based on objective considerations, that the union continued to enjoy the support of a majority of the bargaining unit employees." (App. 25-26, 27.) Accordingly, the company was found to have violated Sections 8(a)(1) and (5) of the Act and was ordered to recognize and bargain with the union. (App. 26-27.) In making its decision, the Board engaged in a head count, counting an employee as no longer wanting union representation only if he made a statement that the Board accepted as unequivocal proof of opposition to the union.

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[4] The procedures for polling are set forth in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967) and *Texas Petrochemicals*, 296 N.L.R.B. 1057 (1989), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991).

That is the same test the Board uses to determine if an employer can lawfully withdraw recognition from a union. The Board did not consider the evidence cumulatively, nor did it inquire whether the evidence was sufficient to raise good faith doubt of union support, even if the evidence was not conclusive.

The Court of Appeals, in a 2-1 decision, enforced the Board's decision and declined to follow the decisions of three other Courts of Appeals which have rejected the Board's standard. *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Indus. Inc. v. NLRB*, 687 F.2d 863 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981). Those courts allow polling to determine if a majority of employees continue to support the union if the evidence is sufficient to raise good faith *doubt* of the union's majority support, even if the evidence is not sufficient to justify withdrawal of recognition.

REASONS FOR GRANTING THE WRIT

I. THE BOARD'S STANDARD IS NOT ENTITLED TO DEFERENCE.

An incumbent union is presumed to represent employees of an asset purchaser, if a majority of the buyer's employees previously worked for the seller. *Auciello Iron Works, Inc. v. NLRB*, ___U.S.___, 116 S.Ct. 1754 (1996); *Fall River Finishing & Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The new employer can overcome that presumption and withdraw recognition by showing (1) that the union did not in fact enjoy majority

support or (2) that the employer had a good faith doubt, based on a sufficient objective basis, of the union's majority support. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990). *See also Harley-Davidson Transportation Co.*, 273 N.L.R.B. 1531 (1985).

In *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), the Board held that in order to poll employees as to their continued support for an incumbent union, an employer must have good faith doubt, based on objective considerations, as to the union's continuing majority status. That is the same test the Board also employs to determine whether there is sufficient evidence to withdraw recognition, or to process an employer-filed decertification (RM) petition. As this case illustrates, in applying that test, the Board focuses on the head count of employees who have made unequivocal statements proving that they no longer support the union. *See also Texas Petrochemicals*, 296 N.L.R.B. 1057 (1989) (divided Board panel reaffirming its standard), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991).

The Board is, of course, entitled to deference as long as its rules are rational and consistent with the Act. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 42. In this case, the Board's standard is neither.

As the dissent in the Court of Appeals pointed out, the most obvious problem with the Board's standard is the result it generated. Allentown Mack, a new employer that had never previously dealt with the union, undeniably had a legitimate interest in knowing if its employees supported the union. The law permitted the company to withdraw recognition if they did not. Allentown Mack

also had a reasonable basis, founded on objective evidence, for doubting whether a majority supported the union. The method used to ascertain whether those doubts were correct – the poll – was conducted in conformity with all Board-required safeguards to ensure against coercion. Nevertheless, as the dissenting Judge in this case observed, after a majority of employees voted against the union, the Board "not only adjudged that the employer committed the unfair labor practice by refusing to bargain with the union that commanded thirteen of thirty-two votes, but also placed the employer under a bargaining order amounting to a bar against de-certification of a union with only 40% support." (App. 14.)

At bottom, the sole explanation for the Board's holding is that it places a higher premium on protecting unions than on employee choice. Section 7, however, places the right to engage in collective bargaining and the right to refrain on an equal footing.[5]

The NLRB's fullest defense of its standard appears in *Texas Petrochemicals, supra*. There, the Board's main points were:

– *Since a poll and a decertification election are similar in purpose and effect, similar evidence should be required.* 296 N.L.R.B. at 1060-61. A poll and an employer-filed

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[5] In this regard, it bears mention that Section 7 only protects employee rights. Any rights a union enjoys under Section 7 are derivative. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

decertification (RM) election are similar in effect.[6] It is irrational, however, to apply the same standard to withdrawals of recognition. The Court of Appeals recognized the illogic of the Board's position, and suggested that it could be cured by raising the standard for withdrawals of recognition. However, the standard for withdrawals of recognition is already as high as it can be.[7]

– *Statutory purposes and goals require a high standard.* 296 N.L.R.B. at 1061-62. The Board wrote that "A principal purpose and ultimate goal of the Act is to promote industrial and workplace stability in collective bargaining relationships." *Id.* at 1061. It further asserted that permitting employer polls would "allow an employer's interest in testing its employees' support for a union to outweigh the statutory goal of stable collective bargaining relationships." *Id.* at 1062.[8]

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[6] The standard for RM elections is immune from judicial review. *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940). There is a certain peremptory quality to the Board's argument that the courts should defer to its polling standard in order to maintain consistency with the Board's unreviewable policy in RM cases.

[7] That standard has been repeatedly enunciated by the Supreme Court. *Auciello Iron Works. v. NLRB, supra; NLRB v. Curtin Matheson, supra; Fall River Dyeing & Finishing, supra.*

[8] In *Auciello Iron Works*, the Court rejected the employer's attempt to champion its employees' rights. However, Allentown Mack has its own right not to bargain with a union that does not, in fact, represent a majority of its employees.

In this case, however, there was no established bargaining relationship. Rather, Allentown Mack was a successor employer. Solicitude for a union's interest in preserving its bargaining relationship during the transition from old to new employer entitles the union to a presumption of continued majority status. *Fall River Dyeing & Finishing*, 482 U.S. at 39-41. However, that solicitude is not unlimited – the presumption is rebuttable.[9] *Id.* As Justice Blackmun, author of the *Fall River Dyeing & Finishing* decision, pointed out in *Curtin Matheson*, the Board's standard makes it almost impossible for a new employer to amass the information necessary to make the rebuttal. As a practical matter, the rebuttable presumption becomes close to irrebuttable.

The reasonable doubt policy is not anomalous. 296 N.L.R.B. at 1063. The Board rejected the criticism that its policy was anomalous because it permitted polling only when it was of no value. The Board argued that some employers might wish to conduct a poll, even if they already had evidence sufficient to permit a withdrawal of recognition, in order to resolve the issue. "An employer may wish first to poll its employees to obtain more certain, precise information about the union's support than

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[9] In this case, the presumption of continued support rests on a weak factual foundation. Employees expressed rational reasons for preferring to give the new employer a chance to operate without a union. For example, employee Solt said he "doesn't want to pay $35 [per month] in union dues, he feels as though it is a complete waste of money." (App. 50.) Employees could sensibly take into account that they no longer worked for a huge multinational corporation, but for a small, locally owned and managed fledgling enterprise.

is provided by its own reasonable doubt." 296 N.L.R.B. at 1063. That, of course, is precisely what the company did in this case. The problem is that the Board makes it impossible to use polling exactly when "more certain, precise information" is most desirable, i.e., when there is substantial doubt, but not necessarily conclusive proof, of the union's loss of majority support.

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON THIS IMPORTANT ISSUE.

The Court of Appeals' decision creates a conflict among the circuits on an important issue, previously pointed out by the Chief Justice and Justice Blackmun in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 797, 800 (Rehnquist, C.J. concurring; Blackmun, J. dissenting).

Three Courts of Appeals have rejected the Board's standard. All three found it unreasonable for the Board to permit polling only when there is no need for a poll. All three permit polling when the employer has "substantial, objective evidence of a loss of union support," even if the evidence would not be sufficient to prove actual loss of majority status. *Mingtree Restaurant, Inc. v. NLRB, supra; Thomas Indus. Inc. v. NLRB, supra; NLRB v. A.W. Thompson, Inc., supra.*

In *NLRB v. A.W. Thompson, supra,* the Court of Appeals for the Fifth Circuit held, "we are not convinced that an employer may conduct an employee poll only when it has no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition." 651 F.2d at 1144 Observing that "the national labor policy favors employee free choice in

such matters," (*id.*) the court concluded that if the employer has not otherwise engaged in unfair labor practices or created a coercive atmosphere, it may, after giving notice to the union, "poll the employees for their union sentiment if there is other substantial, objective evidence of loss of union support (even if that evidence is not sufficient by itself to justify withdrawal) and the poll meets the procedural guidelines set out in *Struksnes.*" *Id.* at 1145.

In *Thomas Industries v. NLRB, supra,* the Court of Appeals for the Sixth Circuit adopted the *A.W. Thompson* polling standard. It rejected the Board's position that in order to conduct a poll, an employer must have objective evidence that over 50 percent of bargaining unit employees have rejected the union.

> We find the Board's position to be untenable. Under the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary; the only value of the poll would be to double check the employer's already sufficient evidence to refuse to bargain.

687 F.2d at 867.

The court further found that the evidence of loss of support should be considered cumulatively (rather than by the Board's head count method), and that the evidence in that case was sufficient to justify the poll. 687 F.2d at 868. The evidence presented included a sharp decline in dues check-offs, negative comments from one-third of the employees, and resignations of union officials.

In the most recent of the three cases, *Mingtree Restaurant, supra*, the Court of Appeals for the Ninth Circuit found,

> The Board has determined that the *Struksnes* procedures adequately protect employee interests in voting secrecy and assurance against employer reprisal in the organizational stage. Again, we see no reason why they would not afford as much protection after the union has been recognized.

736 F.2d at 1298.

The court also rejected the Board's argument that an employer-sponsored election usurps a Board function.

> In the organizational phase, however, the employer may choose between a private poll or a Board-supervised election. After recognition of the union, these options, as a practical matter, are foreclosed since neither employer-petitioned Board elections nor private employer polls will be allowed until the employer first produces other evidence sufficient to permit withdrawal of recognition.

Id. The court continued,

> We find it incongruous for the Board to grant the right to conduct polls of union sentiment during the crucial organizational period and effectively deny that right after the union has been recognized. While we appreciate the importance of maintaining stability in the bargaining relationship, we must also weigh the legitimate concern of the employer that it bargain only with the majority union. On balance, we find that polling that adheres to the *Struksnes* safeguards is an adjunct to, rather than a

> usurpation of, a Board function; it is an objective, minimally disruptive mechanism for obtaining evidence of the level of union support; and it enables the employer to avoid precipitous action, such as the withdrawal of recognition, when only less precise evidence is available.

736 F.2d at 1298.

The Court of Appeals for the Second Circuit also has expressed serious doubts about the Board's standards in this area. In *NLRB v. Albany Steel, Inc.*, 17 F.3d 564 (2d Cir. 1994), an employer withdrew recognition from a union based on substantial evidence casting doubt on the union's continued majority status. While agreeing with the Board that the employer's evidence of a loss of support was insufficient to permit a withdrawal of recognition, the court nonetheless held that the evidence created sufficient doubt to require that an election be held.

> The Board applies the same reasonable good faith doubt standard for ordering an election, for an employer's withdrawal of recognition, and for an employer's polling of employees . . . Although we are always reluctant to disagree with the Board in matters of labor policy, we find the Board's application of the same standard to each of these situations problematic.

Id. at 571. The court concluded that ordering an election was "preferable to enforcing a remedial bargaining order in the face of such doubt of the Union's majority status" (*id.* at 572) and, importantly, "would further the Act's policy of protecting employee free choice." *Id.* at 571.

The Chief Justice and former Justice Blackmun have previously taken note of the issue in this case and questioned the Board's standard. In *NLRB v. Curtin Matheson Scientific, supra,* the Chief Justice (concurring) observed,

> It appears that another of the Board's rules prevents the employer from polling employees unless it first establishes a good faith doubt of majority status. See *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1064 (1989) (the standard for employer polling is the same as the standard for withdrawal of recognition). I have considerable doubt whether the Board may insist that good faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today.

494 U.S. at 797.

Justice Blackmun, dissenting,[10] wrote,

> I am also troubled by the fact, noted in the Chief Justice's concurring opinion, that while the Board appears to require that good faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible to amass direct evidence of its workers' views.

494 U.S. at 800.

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[10] Justice Blackmun was the author of the Court's decision in *Fall River Dyeing & Finishing,* which contains a comprehensive review of labor law successorship doctrine.

Justice Blackmun continued,

> The NLRB has recently reaffirmed its rule that an employer must meet the same good-faith doubt standard in order to poll its employees, petition the Board for an election, or withdraw recognition from the union. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1064 (1989). If good-faith doubt can be established only by the express statements of individual workers, the employer is placed in a difficult bind. *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (CA9 1984) ("By the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition").

494 U.S. at 800, n.3.

The District of Columbia Court of Appeals' decision in this case adopted the Board's standard, and rejected that of the courts. "As between the decisions of the three courts of appeals and the Board, we believe the Board has the better of it." 83 F.3d at 1487. It thus created a clear-cut conflict among the circuits, which should be addressed by the Supreme Court.

CONCLUSION

For these reasons, Allentown Mack respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,
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November, 1996

APPENDIX A

ALLENTOWN MACK SALES AND SERVICE, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 95-1272.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 15, 1996.

Decided May 21, 1996.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Stephen D. Shawe, Baltimore, MD, argued the cause and filed the briefs for petitioner. Frances O. Taylor entered an appearance.

Linda Dreeben, Supervisory Attorney, National Labor Relations Board, Washington, DC, argued the cause for respondent. With her on the brief were Linda R. Sher, Associate General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel. Peter D. Winkler, Supervisory Attorney, National Labor Relations Board, entered an appearance.

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge SENTELLE.

RANDOLPH, Circuit Judge:

Mack Trucks, Inc. sold its truck dealership and repair shop in Allentown, Pennsylvania, to a company formed by three of the dealership's managers. The new company – Allentown Mack Sales and Service, Inc. – took over on December 21, 1990.

For many years before the sale, a union represented the dealership's parts and service employees. Before the sale, the bargaining unit consisted of 45 employees: 32 service mechanics, 11 parts employees, a shop clerk and a janitor. After Allentown Mack bought the dealership, it reduced the number of mechanics to 23 and the number of parts employees to 7. Of the 32 employees hired by the new company, all had formerly worked for Mack Trucks.

In February 1991, after the union demanded recognition, the new company conducted a poll of its employees by secret ballot to test their support for the union. A Roman Catholic priest supervised the polling; he alone viewed the ballots and tallied the results. Nineteen employees voted against union representation; 13 voted in favor. Allentown Mack refused to recognize the union and the union filed unfair labor practice charges against the company with the National Labor Relations Board, which the Board sustained.

In this petition for review of the Board's decision, and the Board's cross-application for enforcement of its cease and desist order and its bargaining order, the pivotal issue is whether Allentown Mack violated §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(5), by conducting the poll and

then refusing to recognize the union on the basis of the poll's results.

I

An incumbent union enjoys a rebuttable presumption that it retains the support of a majority of the employees in the bargaining unit. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-41, 107 S.Ct. 2225, 2232-35, 96 L.Ed.2d 22 (1987). An employer may overcome the presumption through objective indications sufficient to raise a reasonable doubt about the union's majority status, in which event the employer has three options. *See id.* at 41 n. 8, 107 S.Ct. at 2235 n. 8; *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778, 110 S.Ct. 1542, 1544-45, 108 L.Ed.2d 801 (1990). The employer may simply withdraw recognition of the union; or it may seek a Board-conducted election – an "RM" election – pursuant to § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B); or it may conduct a poll of employees, as Allentown Mack did here. *See Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1989 WL 224426 (1989), *remanded as modified*, 923 F.2d 398 (5th Cir.1991). An employer who withdraws recognition or conducts a poll without sufficient evidence of the union's loss of majority support commits an unfair labor practice.

Allentown Mack urges us to hold that the Board's standard for allowing polling – which is the same as that for withdrawing recognition and conducting an RM election – is too strict, that a lesser showing should suffice, and that if the lower standard had been applied in this case, the Board would have found the company's poll legal, and the results of the poll would then have justified

the company's refusal to bargain. We will get to Allentown Mack's evidence of lack of union support, evidence it says warranted the taking of the poll. First we must deal with the company's challenge to the Board's rule that an employer may poll only if it has objective indications raising a reasonable doubt about the union's majority status.

Three courts of appeals have rejected the Board's standard because, they believed, it rendered employer polls useless.[1] In light of the Board's approach, these courts wondered why an employer would ever need to conduct a poll. The only proper purpose of a poll, according to the Board, is to determine the truth of a union's claim of a majority. *See Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967). By using polls, employers can avoid making mistakes about the extent of employee support for the union. Yet the Board permits an employer to conduct a poll only when the employer already has "sufficient objective evidence to justify withdrawal of recognition from the union." *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir.1984). If polls are to be a "useful and legitimate tool" for employers with "sincere doubts" about the union's support,[2] the evidentiary standard for polling must be lower than the standard for withdrawing recognition. The Fifth, Sixth and Ninth Circuits therefore

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[1] *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144-45 (5th Cir.1981); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir.1982); *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297-99 (9th Cir.1984).

[2] *Thompson*, 651 F.2d at 1145; *Thomas Indus.*, 687 F.2d at 869; *Mingtree Restaurant*, 736 F.2d at 1299.

rejected the Board's standard and adopted their own, lower standard. Under the courts' standard, employers may conduct polls if they have "substantial, objective evidence of a loss of union support," as distinguished from a loss of the union's majority status.[3]

In the face of these decisions, the Board reconsidered its polling standard in *Texas Petrochemicals Corp.*, 296 N.L.R.B. at 1059-63, but decided to maintain it. The Board found it anomalous for the courts to allow an employer to conduct a poll – which has the same purpose as an RM election, but lacks the procedural protections – when the Board would refuse to conduct an RM election because the employer could not satisfy the evidentiary standard.[4] The Board said it favored elections over polling and

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[3] *Thompson*, 651 F.2d at 1145; *Thomas Indus.*, 687 F.2d at 869; *Mingtree Restaurant*, 736 F.2d at 1299.

[4] The Board put it this way:

> It would be anomalous to on one hand require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board-conducted RM election for the purpose of determining the union's majority support, while on the other hand permitting that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e., the courts' "loss of support" standard.

Texas Petrochemicals Corp., 296 N.L.R.B. at 1060.

described polling as "potentially disruptive and unsettling." *Id.* at 1061-62. Nevertheless, the Board acknowledged the "right" of an employer to take a poll "on the basis of reasonable doubt about a union's majority status." *Id.* at 1061. The Board thought that even then polling could still serve an important role. Although an employer meeting the Board's "reasonable doubt" standard could cease recognizing the union, "there still remains an inherent uncertainty about whether the union has actually lost its majority support. . . . Rather than simply withdraw recognition from a union that might still in fact have majority support, an employer might wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt. The employer can then act with confidence and certainty in light of the results of the poll." *Id.* at 1063. The Board concluded that allowing polling only in these limited circumstances achieves the best balance between the employer's interest in testing employee support for the incumbent union, and the statutory goal of stable collective-bargaining relationships. *Id.* at 1062.

Neither the courts' analysis nor the Board's response is entirely satisfactory. The courts' basic proposition – that the standard for polling should be lower than the standard for withdrawal of recognition – does not necessarily lead to the courts' conclusion that the Board's polling standard should be relaxed. The courts' objective could be accomplished by raising the Board's withdrawal-of-recognition standard. In deciding as they did, the courts have created the anomaly the Board identified, making it easier for an employer to conduct an unsupervised poll than to have a Board-supervised RM election.

Furthermore, we do not understand why the courts thought there was something wrong in the Board's having a standard that rendered polling only marginally useful to employers. Nothing in the National Labor Relations Act specifically governs this practice. Polling employees about their support for an incumbent union is, the Board believes, "potentially, if not inherently, both disruptive of the collective-bargaining relationship . . . and also unsettling to the employees involved." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. In light of these dangers, the Board, in its expert judgment, reasonably limited the circumstances in which employers may conduct polls. *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 866-67 (6th Cir.1982), and *Mingtree Restaurant*, 736 F.2d at 1298, tout polling as a means by which employers may avoid the risk of bargaining with a minority union, itself a violation of § 8(a)(2). But the risk is nonexistent. The employer is protected by the presumption of the union's continuing majority status. *See* Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS.L.REV. 653, 665, 667-70.

As to the Board's reasoning in *Texas Petrochemicals*, it seems to us inconsistent for the Board to say that RM elections are the preferred method for testing employee support of the union, 296 N.L.R.B. at 1061, and yet maintain the same evidentiary standard for allowing polling. The Board's statements about RM elections "lead squarely to the conclusion that the polling standard should be *more* stringent than that for RM elections." 1991 WIS.L.REV. at 660. But suppose the Board is correct that because polling and RM elections enable employers to test union support, the same evidentiary standard should

apply. How then can the Board justify applying the identical standard to an employer's decision to withdraw recognition, a decision lacking any procedural safeguards? The Board's analysis, it seems, should have led it to impose a more stringent evidentiary standard on employers who withdraw recognition without having the results of a poll or an RM election. *Id.*

As between the decisions of the three courts of appeals and the Board, we believe the Board has the better of it, and not simply because it is the agency charged with administering the National Labor Relations Act. The only issue here relates to polling. It may be that the Board should set a higher standard for withdrawals of recognition and a lower standard for RM elections, but those questions are not before us and, at any rate, we could not answer them without first choosing a baseline from which to measure "higher" and "lower." Nothing we have seen justifies our disregarding the Board's choice and replacing it with a judicially-created lower standard for polling. The Board's system has its faults, but so does the one created by the courts. In this situation, the only proper course is for us to defer to the Board. *Fall River*, 482 U.S. at 42, 107 S.Ct. at 2235; *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01, 98 S.Ct. 2463, 2473-74, 57 L.Ed.2d 370 (1978). The Board, not the courts, has "the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 786, 110 S.Ct. at 1549.

II

Applying its evidentiary standard for polling, the Board found that Allentown Mack had not satisfied it. According to the Board, only 7 of the 32 employees in the bargaining unit made statements repudiating the union, far short of the number needed to raise doubts about the union's majority support. Allentown Mack challenges this conclusion on the ground that the Board should have counted several other employees among the group not favoring the union.

Of the employees the Board refused to count, three – Pete McArthur, Dennis Wehr, and Randy Zoltack – were not members of the bargaining unit on January 25, 1991. That is the date of Allentown Mack's letter to the union refusing recognition and announcing the poll. We see no basis for disagreeing with the Board's use of January 25 as the date for assessing the company's compliance with the polling standard. The letter was the company's first communication with the union after the union's demand for recognition on January 2. By the date of the letter, Allentown Mack had already decided to take the poll. It follows that the views of employees who were hired after January 25 could not support the company's decision. And the Board had sufficient reason not to count employees who were, by that date, no longer working for the company. The question, as the Board framed it, was whether on January 25 Allentown Mack reasonably doubted whether a majority of the employees then working supported the union.

The Board discounted the statements of two other employees – Mike Ridgick and Dennis Marsh. After being

told during a job interview that the new company would be non-union, Ridgick said that "as long as the new company would treat them right, there was no need for a union." Allentown Mack thinks it significant that in 1986 Ridgick had asked a manager about decertifying the union, but the ALJ found the 1986 statement too remote to be probative of Ridgick's union sympathies in 1991. The ALJ also found Ridgick's statement during the interview "at best equivocal." Why, the ALJ asked, would Ridgick have expressed any prounion sentiment during a job interview, especially after having been told that the new company would be non-union? As to Marsh, he said during his job interview that he was paying $35 a month in union dues and not getting his money's worth. The ALJ found that Marsh's expression of dissatisfaction with the union did not mean he wanted the union to stop representing him and the other employees.

The Board had good reason to agree with the ALJ about both of these employees. Board precedent holds that an employer may not rely on an employee's anti-union sentiments, expressed during a job interview in which the employer has indicated that there will be no union. Such employee expressions are unlikely to be sincere. *Middleboro Fire Apparatus, Inc.*, 234 N.L.R.B. 888, 894, 1978 WL 7283, *enforced*, 590 F.2d 4, 9 (5th Cir.1978). Board precedent also holds that an employee's statements of dissatisfaction with the quality of union representation may not be treated as opposition to union representation. *Destileria Serralles, Inc.*, 289 N.L.R.B. 51, 1988 WL 214114 (1988), *enforced*, 882 F.2d 19 (1st Cir.1989); *Wagon Wheel Bowl, Inc. v. NLRB*, 47 F.3d 332, 335-36 (9th Cir.1995).

Allentown Mack also invoked the statements of two employees – Kermit Bloch and Ron Mohr – as evidence of the views of other workers in the unit. Bloch told a manager that the entire night shift, consisting of five or six employees, did not want the union. The ALJ refused to credit this because Bloch did not testify and thus did not explain how he formed his opinion. Also, there was no evidence that any of the night shift employees made independent representations to the company about their union sympathies, and none of those employees testified at the hearing. Mohr, who was the union steward for the service department, told a manager that if a vote was taken, the union would lose and that he did not think the employees wanted a union. The ALJ rejected Mohr's statement, calling it an "almost off-the-cuff" remark and an "unverified assertion." Mohr did not testify about how he formed his opinion or about which employees – only those in the service department or all employees in the unit – he had in mind. Allentown Mack is not correct that the Board, in adopting the ALJ's findings, contradicted its precedent and ours. The Board has consistently questioned the reliability of reports by one employee of the antipathy of other employees toward their union. *See Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 n. 11, 1989 WL 223989 (1989); *Louisiana-Pacific Corp.*, 283 N.L.R.B. 1079, 1080 n. 6, 1987 WL 89647 (1987); *Sofco, Inc.*, 268 N.L.R.B. 159, 160 n. 10, 1983 WL 24722 (1983); *Bryan Mem. Hosp. v. NLRB*, 814 F.2d 1259, 1262 (8th Cir.), *cert. denied*, 484 U.S. 849, 108 S.Ct. 147, 98 L.Ed.2d 103 (1987); *NLRB v. Cornell of California, Inc.*, 577 F.2d 513, 516 (9th Cir.1978). The two cases Allentown Mack cites – *Naylor, Type & Mats*, 233 N.L.R.B. 105, 1977 WL 9263 (1977), and *American Mirror*

Co., 277 N.L.R.B. 1626, 1986 WL 53709 (1986) – are distinguishable. In both, the information the employer received about other employees was, unlike the information the company relied on here, specific and detailed. As to shop steward Mohr, it is true that the Board and this court have held that a company may sometimes rely on a union official's admission that the union lacks majority support. *See Universal Life Insurance*, 169 N.L.R.B. 1118, 1119 (1968); *Lodges 1746 & 743, Int'l Ass'n of Mach. & Aero. Workers v. NLRB*, 416 F.2d 809, 812-13 (D.C.Cir.1969), *cert. denied*, 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed.2d 752 (1970). But, for the reasons given by the ALJ, Mohr's statement did not have sufficient indicia of reliability to justify the company's treating it as a reflection of the views of a majority of the workers in the unit.

We therefore sustain the Board's decision, as supported by substantial evidence, that only 7 of the 32 employees had repudiated the union and that Allentown Mack did not have a reasonable doubt about the union's continuing majority status.

III

As part of its remedy, the Board ordered Allentown Mack to bargain with the union, and barred it from challenging the union's majority status for a reasonable period of time. The company objects to this portion of the order on the grounds that the Board did not explain why the bargaining order was necessary and did not weigh the need for union protection against the competing interest of employee choice. *See Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C.Cir.1994); *Charlotte Amphitheater*

Corp. v. NLRB, 82 F.3d 1074, 1077-78 (D.C.Cir.1996). But Allentown Mack never raised this objection before the Board and it presented no evidence regarding the propriety of a bargaining order. The Board does not have an "affirmative duty" to consider the sort of challenge the company makes here. *Charlotte Amphitheater*, 82 F.3d at 1079. "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). There were no "extraordinary circumstances." Allentown Mack has no excuse. The ALJ's decision recommending a bargaining order gave the company fair warning that one might be in the offing. And after the Board ruled, the company could have, but did not, move for reconsideration. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 49-50 (D.C.Cir.1990).

Petition for review denied, cross-petition for enforcement granted.

SENTELLE, Circuit Judge, dissenting:

At the outset of this dissent, a brief review of the underlying facts and the result reached by the Board and the majority is in order. Allentown Mack, a new company, undertook operations by hiring thirty-two of the forty-five employees of a predecessor company. The bargaining unit in the predecessor company had been represented by a union. The union demanded recognition. Seven of the thirty-two bargaining unit employees made unequivocal statements that they did not desire to be any longer represented by the union. Another employee, not counted among the seven, asked a management employee about

de-certifying the union. Another employee, indeed a union steward, told the branch manager that the employees did not need a union. Still another employee in his employment interview stated that he was not being represented for the $35.00 he was paying. One of the seven who made the statements of wishing not to be unionized, also stated that "the entire night shift did not want the union." Another employee, the shop steward in the largest of the two departments in the bargaining unit, told the manager that "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union."

Based on these expressions of union disinterest from the employees, the company management conducted a poll supervised by a Roman Catholic priest. There is no finding by the Administrative Law Judge ("ALJ") or the Board that the company conducted the poll in any unfair or improper manner whatsoever. In the poll, the employees rejected the union by a margin of 19-to-13. The ALJ found, the Board concluded, and the majority today affirms that "the respondent lacked a reasonable doubt of the union's continued majority status. . . . " *Allentown Mack Sales*, 316 N.L.R.B. 1199, 1200, 1995 WL 221136 (1995). Based on that conclusion the Board not only adjudged that the employer committed the unfair labor practice by refusing to bargain with the union that commanded thirteen of thirty-two votes, but also placed the employer under a bargaining order amounting to a bar against de-certification of a union with only 40% support.

I do not suggest that our decisions should be result-driven. I do not even suggest that in every instance in which an administrative agency's application of the law

yields a bizarre result a petition for review should be allowed; but when such a result does occur, that application of the law should be closely scrutinized, particularly when other courts have avoided that result. When the law becomes divorced from logic and from the common sense of the people who live under it, then the Dickens character Mr. Bumble who declared that "the law is a ass" becomes most believable.[1] The Board's rule, establishing that an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless, is just such an application. The three other circuits who have examined this question have unanimously concluded that the Board's rule cannot stand.

A Fifth Circuit decision in *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir.1981), began with the indisputable proposition that under the NLRA an employer must bargain with a union which represents the majority of the employees but must not bargain with the union that does not have majority support, and that a violation of either of these duties is an unfair labor practice under § 8(a)(1). The court further noted that the NLRB had recognized in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967), that a union support poll is a "valid and helpful" device for the

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[1] CHARLES DICKENS, OLIVER TWIST 399 (New Oxford Illustrated Dickens ed., Oxford University Press 1966) (1838).

testing of union sentiment.[2] Reasoning from these underlying principles, the *Thompson* court expressly held that:

> when an employer "has not engaged in unfair labor practices or otherwise created a coercive atmosphere," it may, after giving notice to the union, poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal) and if the poll meets the procedural guidelines set out in *Struksnes*.

A.W. Thompson, Inc., 651 F.2d at 1145 (quoting *Struksnes*, 165 N.L.R.B. at 1063).

In *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir.1984), the Ninth Circuit faced the same question and reached the same conclusion. Like the Fifth Circuit, the Ninth held that polling is a "useful and legitimate tool for the employer who is in sincere doubt of the union's majority status," and "therefore h[e]ld . . . that as long as the employer complies with the *Struksnes* conditions and procedural safeguards, it may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient by itself to justify withdrawal of recognition. . . . " *Id.* at 1299.

The Sixth Circuit, in *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863 (6th Cir.1982), discussed the question with

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[2] Concededly, the *Struksnes* opinion was not genuinely on point either in *Thompson* or in the instant case as it dealt with initial certification rather than de-certification holding, but that would not seem to affect pertinent reasoning.

reasoning particularly helpful in the instant case. That Circuit noted the dilemma of the employer who would commit an unfair labor practice if it refused to bargain with a union having majority support or did bargain with a union which did not enjoy that support. The Circuit further noted that a union enjoying certified majority support was entitled to a presumption of continuing support, but that the presumption became rebuttable after one year and that the year had passed in the *Thomas* case well before the poll was taken. *Id.* at 867. As did the Fifth and Ninth Circuits, the Sixth Circuit held "that an employer may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." *Id.*

In the *Thomas Industries* case, an ALJ had found that approximately one-fourth of the employees had made negative statements concerning representation. On that and other evidence, he found that the company had no objective basis to doubt the majority support for the union and held the polling to be a § 8(a)(1) violation. *Id.* The Board concurred. The court reversed, holding: "We find no substantial evidence to support the Board's conclusion that the Company did not have a good faith doubt as to the Union's majority status." *Id.* at 868. Just so in the present case.

Indeed, the present case is, if anything, a stronger one for rejecting the Board's approach than was *Thomas*. The *Thomas* court noted that the presumption of continuing majority status "was rebuttable since more than one year had passed" since the certification. *Id.* at 867. The emerging bargaining unit at Allentown Mack had never

been literally sampled for majority support. Its thirty-two employees were drawn from a larger unit previously represented, and it is of course the law that a successor employer inherits the bargaining obligation of its predecessor. *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 36-41, 107 S.Ct. 2225, 2232-35, 96 L.Ed.2d 22 (1987). Nonetheless, the factual underpinnings for the presumption of continuing status obviously are weaker when a unit contains less than all of the previously certified employee group.[3] As in the *Thomas Industries* case, the ALJ and the Board affirming the ALJ offer nothing of record to support their conclusion that the polling employer lacked a good faith doubt as to the union's majority status. I find it arbitrary and capricious of the Board to find that the employer committed unfair labor practices in the face of overwhelming unrefuted evidence that the union lacked majority support, including a poll taken with the utmost in safeguards for fairness and objectivity.

As there is no suggestion of unfairness in this case and there is overwhelming objective evidence of the loss of majority support, I would hold that the Board reached the wrong conclusion.

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[3] By way of example, if the 45 employees in the prior unit had been split at 23-to-22 in achieving the prior majority, without any change of sentiment on the part of any employee, the majority status would cease to exist if the 13 no longer employed unit members were split 8-to-5 in favor of the union, an event not statistically unlikely.

APPENDIX B

Allentown Mack Sales & Service, Inc. *and* Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL-CIO.
Case 4-CA-19516

April 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND
MEMBERS STEPHENS AND TRUESDALE

On January 24, 1992, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed cross-exceptions, supporting briefs, and answering briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified herein and to adopt the recommended Order.

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[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility determinations, we do not rely on the adverse inference he drew from the General Counsel's failure to recall Ron Mohr as a rebuttal witness.

The judge found that the Respondent is the successor to Mack Trucks, Inc. (Mack) and that it had not demonstrated that it harbored a reasonable doubt, based on objective considerations, as to the incumbent Union's continued majority status after the transition. He therefore found that the Respondent violated Section 8(a)(5) and (1) by conducting a poll of the unit employees to determine their desires for continued union representation, and by declining to extend recognition to the Union on the basis of the results of the poll, which the Union lost. The judge did not, however, find that the Respondent unlawfully refused to bargain with the Union prior to the poll.

The Respondent has excepted to the judge's finding that it lacked a reasonable doubt that the Union continued to enjoy majority support, and to all the violations he found. The General Counsel and the Union have excepted to the judge's failure to find that the Respondent's refusal to bargain prior to the poll violated Section 8(a)(5) and (1), and to his failure to find that the poll constituted an independent violation of Section 8(a)(1).

We adopt the judge's findings that the Respondent is Mack's successor[2] and that it had hired a substantial and representative complement of employees at the time it is alleged to have violated the Act.[3] We also adopt his

[2] We therefore find it unnecessary to pass on the General Counsel's exception to the judge's finding that Mack, rather than the Respondent, advertised truck modification services.

[3] The judge, however, indicated that the employees hired were a representative complement of the former bargaining unit, because nearly all of the Respondent's service and parts employees were former bargaining unit members. In so doing, the judge inadvertently commingled two separate concepts; there is no such thing as a "representative complement of the former bargaining unit." "Substantial and representative complement" refers to the successor employer's level of employment and operations, not to the number of employees formerly employed by the predecessor. The Board finds that a bargaining obligation attaches when the successor has hired a substantial and representative complement of employees *and* a majority of those employees had been employed by the predecessor. See discussion in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 46-52 (1987). That was the case here in January 1991.

finding that the Respondent has not demonstrated that it held a reasonable doubt, based on objective considerations, that the Union continued to enjoy the support of a majority of the bargaining unit employees.[4] In this regard, we agree with the judge that the Union did not waive its right to represent the employees by entering into an agreement with Mack which provided in part that "[t]he current Agreement between the parties will be rendered null and void as of the close of business on

[4] We therefore find it unnecessary to pass on the General Counsel's and the Union's exceptions to the judge's findings that the Respondent could properly rely on statements by Jon McKilvie and Scott Murphy to support a reasonable doubt as to the Union's continued majority status.

In discounting statements made in employment interviews by Ronald Mohr and Mike Ridgick because those applicants had been told in their interviews that the new company would be nonunion, the judge cited *Phoenix Pipe & Tube Co.*, 302 NLRB 122 fn. 2 (1991), enfd. 955 F.2d 852 (3d Cir. 1991). Although the cited reference was to then Chairman Stephens' personal footnote, and not to the decision of the Board, the judge's finding was consistent with Board precedent. See *Middleboro Fire Apparatus*, 234 NLRB 888, 894 (1978), enfd. 590 F.2d 4 (1st Cir. 1978).

December 20, 1990.[5] Any and all grievances filed or to be filed are to be considered settled as of this date." We find no merit to the Respondent's argument that, because the only evidence of Mack's recognition of the Union is the contractual recognition clause, the Union waived its right to recognition by signing the above agreement. The waiver of a statutory right must be clear and unmistakable and will not be inferred merely from a general contractual provision.[6] The general statement that the contract will become null and void as of the time the Respondent took over operations from Mack contains no clear and unmistakable indication that the parties intended to put an end to the Union's representative status. Accordingly, the judge properly found that the Respondent could not legitimately rely on the Union's agreement with Mack as a basis for forming a reasonable doubt that the Union still represented a majority of the unit employees.

The Respondent contends that the judge erred in finding that the Respondent could not legitimately rely on a statement by Ronald Mohr, the Union's service department steward, as a basis for doubting the Union's majority status. According to the credited testimony of the Respondent's president, Robert Dwyer, Mohr told Dwyer before the transition that "with a new company that if we took a vote that the union would lose, and that it was his feeling that the guys didn't want a union." The

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[5] Mack operated the Allentown facility until December 20, 1990. The Respondent began operating the facility on December 21.

[6] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Respondent argues that that statement, made by a "Union official," was probative of a loss by majority on the part of the Union.

The judge, however, found (among other things) that Mohr made that statement in December 1990, before the Respondent's supervisors began to interview Mack's employees for possible employment in the new company. The Respondent hired only 23 of Mack's 32 service employees and only 7 of its 11 parts employees, as well as a janitor and a computer operator who had been in the Mack bargaining unit. The judge found that when Mohr made his remark to Dwyer, he was referring to Mack's existing employee complement, not to the individuals who were later hired by the Respondent, and reasoned that "Certainly the composition of the complement of employees hired would bear on whether this group did or did not support the Union." He further found that Mohr was not in a position to speak for the parts employees. The Respondent, in exceptions, contests the judge's finding that Mohr was referring to Mack's employee complement, not the Respondent's, and argues that Mohr's comments should be given more weight than equivalent remarks of a rank-and-file employee because he was a union steward.

We find no merit to those contentions. Although the record does not clearly establish exactly when Mohr made his statement to Dwyer, Dwyer was asked to describe all statements made by employees *before the December interviews* that indicated a loss of employee support for the Union. Mohr's was one of the statements recounted by Dwyer, with no indication that the timeframe had changed. Accordingly, we find that the

record supports the judge's finding that Mohr made his remark before the interviews had been conducted, and thus that the judge was warranted in inferring that Mohr must have been referring to Mack's employee complement, not the Respondent's.[7] We also agree with the judge that, as steward for the service department, Mohr had no more basis than any other employee for reporting the union sentiments of employees in the parts department. For the above reasons, as well as the others discussed by the judge, we adopt the judge's finding that the Respondent could not rely on Mohr's statement as a basis for doubting the Union's majority status.[8]

[7] In any event, the Respondent bears the burden of establishing that it reasonably doubted the Union's majority status. See, e.g., *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). The Respondent has not met its burden of showing that Mohr made his statement after the interviews. Dwyer could not remember the actual date in December on which he talked to Mohr; he testified that it was "approximately the 15th or so." Mohr testified that the conversation took place in December, before the Respondent took over the facility; he did not say whether it was before or after the interviews. The Respondent therefore has not demonstrated that Mohr was referring to the Respondent's employee complement when he said that the Union would lose a vote of the employees. In this regard, this case is distinguishable from *J & J Drainage Products*, 269 NLRB 1163 (1984), in which the Board relied on a steward's statement, made after the successor employer took over the facility, that the employees did not want a union.

[8] The Respondent relies on several decisions which, it alleges, require the opposite result. We disagree. As is evident from the Respondent's brief, those cases are factually distinguishable from this one in numerous respects. In particular, *Universal Life Insurance Co.*, 169 NLRB 1118 (1968); *Machinists Lodges 1746 & 743 v. NLRB*, 416 F.2d 809 (D.C. Cir. 1969); and *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978), all involved statements by union bargaining representatives or attorneys concerning loss of support. Those individuals evidently were in a better position to know the sentiments of employees overall than was Mohr, who as a steward represented only the service employees. They were also more obviously speaking for their respective unions than was Mohr, and therefore the employers were more justified in relying on their remarks as admissions on the part of the unions than the Respondent was in relying on Mohr's statement. In *Naylor, Type & Mats*, 233 NLRB 105 (1977), the administrative law judge accepted an employee's statement that he was personally unhappy with the union and that "people in the front and back" did not recognize the union as evidence that the union lacked majority support; however, the judge evidently considered that statement only as indicating that the speaker opposed the union, not that others did. The judge also held that the employer could rely on remarks by two employees that they had actually taken head counts and enumerated the employees who supported and who opposed the union. The Respondent relies on no such testimony. Finally, to the extent the court decisions are inconsistent with Board law, we respectfully decline to follow them.

We agree with the General Counsel and the Union that the judge erred in finding that the Respondent did not unlawfully refuse to bargain by informing the Union in its January 25 letter that it would not recognize and bargain with the Union until it received the results of its February 8 poll of the unit employees. (The judged reasoned that the Respondent "merely postpone[d] that decision until the results of the employee poll [were] known.") As the judge properly found, however, the Respondent lacked a reasonable doubt of the Union's continued majority status and therefore was not entitled

to take the poll at all.[9] Thus, it had no "decision" to make, let alone postpone. Its duty was to bargain, not to wait for the outcome of an unlawful poll before it made up its mind to comply with its statutory obligations. An employer may not delay bargaining while it awaits the outcome of an event it may not insist on taking place to begin with.[10] Consequently, the Respondent violated Section 8(a)(5) and (1) by refusing to bargain pending the outcome of the poll.

We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union on the basis of the results of

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[9] *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1058-1063 (1989). We agree with the judge that the showing made by the Respondent (6 or 7 employees opposed to the Union out of a bargaining unit of 32) would be insufficient to meet even the more lenient standard for polling endorsed by several courts of appeals. See Member (then Chairman) Stephens' concurring opinion in *Texas Petrochemicals*, supra at 1065-1066. Member Stephens would affirm the judge's finding on this point for the reasons discussed in that concurrence.

The judge found that the Respondent violated Sec. 8(a)(5) and (1) by taking the poll. As the complaint does not allege an 8(a)(5) violation in this regard, we find only that the poll violated Sec. 8(a)(1). Because we find that the Respondent was not entitled to conduct the poll, we find it unnecessary to decide whether the judge correctly found that the Respondent provided the Union sufficient advance notice of the poll under *Texas Petrochemicals*, supra.

[10] *See, e.g., Lee Lumber & Building Material Corp.*, 306 NLRB 408, 410, 419-420 (1992) (employer violated Sec. 8(a)(5) by delaying bargaining for several weeks on the basis of a pending decertification petition, contrary to *Dresser Industries*, 264 NLRB 1088 (1982)).

the poll. We agree with the judge that, because the poll itself was an unfair labor practice, the Respondent could not lawfully rely on the results of the poll in declining to recognize the Union.[11]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Allentown Mack Sales and Service, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.[12]

Richard Heller, Esq., for General Counsel.

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[11] *Texas Petrochemicals*, supra at 1064. As the Respondent was not entitled to rely on the results of the tainted poll in refusing to recognize and bargain with the Union after February 8, neither could it rely on those results to validate its earlier unlawful refusal to bargain. Thus, there is no merit to the Respondent's argument that the poll was lawfully taken in preparation for its defense to the pending unfair labor practice charge, because the results of the poll could not have been used in that defense. Cf. *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965)

[12] To remedy the Respondent's unlawful refusal to recognize and bargain with the Union, the judge imposed an affirmative bargaining order. In exceptions, the Respondent argues only that it did not violate the Act, not that a bargaining order is an inappropriate remedy for an unlawful refusal to recognize and bargain with an incumbent union. In any event, an affirmative bargaining order is the standard Board remedy for such a violation. See *Williams Enterprises*, 312 NLRB 937, 940 (1993). We find, for the reasons discussed in that decision, that the judge imposed the appropriate remedy here.

George S. Flint, Esq., of New York, New York, for the Respondent.

Dennis P. Walsh, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

Wallace H. Nations, Administrative Law Judge. Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL – CIO (the Union) filed a charge on January 22, 1991, against Allentown Mack Sales & Service, Inc. (Respondent). The Union filed an amended charge on February 14, 1991. Based upon these charges, the Regional Director for Region 4 issued complaint and notice of hearing on March 27, 1991, alleging, inter alia, that Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the National Labor Relations Act. Respondent filed timely answer admitting certain of the complaint allegations, including jurisdiction and labor organization status of the Union, but denying that it has committed any unfair labor practice.

Hearing was held in these matters on October 15 and 16, 1991, in Philadelphia, Pennsylvania. Briefs were received from all parties on or about December 16, 1991. Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

Findings of Fact

I. JURISDICTION

Respondent, a corporation, engages in the retail sale and repair of new and used trucks and parts at its facility located in Allentown, Pennsylvania. It is admitted and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts and the Issues for Determination*

The Respondent sells and repairs new and used trucks and sells truck parts at a single facility in Allentown, Pennsylvania. The facility was owned and operated by Mack Trucks, Inc. (Mack) as a factory branch until December 20, 1990.[1] The Union represented a unit of Mack Truck's service and parts employees at this facility, and its final collective-bargaining agreement with Mack

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[1] All dates are in 1990 unless otherwise noted.

Trucks was effective by its terms from September 15, 1989, through September 15, 1992.[2]

By memorandum of understanding dated December 5, the Respondent and Dwyer Holdings, Inc. purchased certain assets of Mack at or relating to the Allentown facility. The Respondent commenced operating on December 21.

By letter dated January 2, 1991, and received by Respondent on January 7, the Union requested recognition and bargaining over a collective-bargaining agreement with respect to unit employees. On January 25, 1991, the Respondent, by letter, declined to extend recognition until further investigation, citing a good-faith doubt as to the Union's majority status among unit employees. Pursuant to notice given in this letter, the Respondent held a poll of its employees on February 8, 1991, wherein the majority of employees voting indicated they did not want to be represented by the Union.

By letter dated February 12, 1991, the Union rejected the results of the poll. There has been no further communication between the parties, except through the filing of charges with the Board.

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[2] The recognized appropriate unit of employees is as follows:

> All shop employees, shop clerk and partsmen who perform work of the classifications outlines in Article XII of the Collective-Bargaining Agreement. Excluded shall be all office clericals, watchmen, drivers, salesmen, foremen and other supervisors as defined in the Labor Management Relations Act of 1947.

Given these background facts, the complaint alleges the following facts which give rise to the allegations of violation of Section 8(a)(1) and (5) of the Act:

1. On or about February 8, 1991, the Respondent, acting through Robert J. Dwyer, at the Allentown facility, interrogated its employees regarding their union membership and sympathies.

2. On or about January 2, 1991, the Union, by letter from Michael J. Walsh, business representative, to Robert J. Dwyer, requested the Respondent to recognize it, and to bargain collectively with it, as the exclusive representative of the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

3. Since on or about January 7, 1991, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive representative of the unit.[3]

General Counsel asserts that Respondent is a successor to Mack with respect to its obligation to recognize and bargain with the Union as representative of the employees in the unit. He also asserts that the Respondent unlawfully interrogated its employees in the unit and that the Respondent cannot lawfully rely on the results of a poll to refuse to recognize the Union. Respondent asserts that it is not a successor, that it had a good-faith doubt with respect to the Union's majority status

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[3] The complaint alleged January 25, 1991 as the date Respondent refused to recognize the Union. General Counsel amended the complaint at the hearing to allege the earlier date.

among its unit employees, and that in fact, the Union did not enjoy majority status.

B. *Was the Respondent a Successor Employer and was the Union Entitled to a Presumption of Majority Status Among the Affected Employees of Respondent?*

As noted above, Mack Trucks, Inc. operated the involved facility as a factory branch until it sold the facility to Respondent and designated Respondent as an independent dealership on December 20, 1990. Since 1973, Mack had recognized the Union as the exclusive representative of a unit of its employees, primarily service department mechanics and parts department employees. Successive collective-bargaining agreements had been entered into between Mack and the Union covering these employees, the last such agreement being executed in 1989 and set by its terms to expire in 1992.[4]

In 1990, the Mack branch was managed by Robert Dwyer, and had as its business manager, Richard Welch; its service manager, David Worth; and a parts manager whose name I do not find in the record. Service department foremen were Roy Christ and David Grimm. Dwyer learned in mid-May that the branch facility was going to be sold and in June learned what the asking price would be. In August, he and a group of investors, including

[4] Respondent asserts that General Counsel failed to establish the manner in which the Union became recognized as the representative of the involved unit of Mack employees. Whether the Union was certified by the Board or voluntarily recognized by Mack, it still is entitled to the presumption of continued majority status and to be recognized by a successor.

Worth and Welch, made an offer to Mack to purchase the facility and operate it as an independent distributorship. Dwyer was subsequently notified that his group was the successful bidder and the parties entered into negotiations to effect the purchase. This resulted in a memorandum of understanding dated December 5, as well as a separate real estate agreement and lease. Mack retains no ownership interest in Respondent and did not provide any financing for the purchase.

In July, Mack sent a letter to the Union which reads:

> I regret to inform you that on September 14, 1990, Mack Trucks, Inc. will consummate the sale of its branch facility located on Route 309 in Allentown, Pennsylvania. This will result in permanent loss of employment beginning on September 13, 1990 for all the individuals in the bargaining unit represented by your local at that location. This notice is provided herewith is intended to satisfy the Federal WARN Act (Public Law 100-379).

Mack and the Union held two bargaining sessions over the effects of the sale of the facility on the bargaining unit. The first of these sessions took place on November 15. Representing Mack at this meeting were Tom Thomasik, Mack's labor representative, and the branch facility manager, Dwyer. For the Union were Union Representatives Michael Walsh and James Walsh and employees Ron Mohr, Dennis Ware, and Larry Frantz. According to Michael Walsh, the meeting opened with a discussion of the date of the closing of the branch and who would be hired after closing. Thomasik said the facility would undergo a transfer of ownership and

would reopen as an independent dealership, with Dwyer as owner. James Walsh asked if the Union would represent employees under the new ownership and would Dwyer bargain with the Union. Dwyer did not respond, and Thomasik said that he was meeting only to discuss effects bargaining. Dwyer did not remember being identified as the purchaser at this meeting or any question being directed to him with respect to future recognition of the Union. I credit Dwyer's testimony in this regard as the transaction between his group and Mack was not completed until December 5, a date subsequent to this meeting.

A second meeting between the same parties occurred on December 6. At this meeting, the Union presented a proposal for the close down, continuation of health and welfare benefits, and severance pay. It asked Thomasik for a copy of the sales agreement for the transfer of the facility. At this second session, it was known that Dwyer was going to be a principal in the purchaser and the Union asked him to recognize the Union. Thomasik cut the conversation off by saying the meeting was for effects bargaining only and it was not the proper forum to raise this issue. According to Dwyer, one of the Walshs' responded, "We can do it the easy way, or we can do it the hard way." Dwyer did not comment.

As a result of the meeting, the Union and Mack reached an agreement with respect to the change in ownership which provides:

> 1. The current Agreement between the parties will be rendered null and void as of the close of business on December 20, 1990. Any

> and all grievances filed or to be filed are to be considered settled as of this date.
>
> 2. The Company will pay for all unused vacation calculated in accordance with Article IX of the current Agreement.
>
> 3. The Company will pay for all accrued vacation in accordance with Article IX of the current Agreement.
>
> 4. Hospital, Surgical, Medical, Major Medical, Vision and Dental Coverage in effect for eligible branch bargaining employees and their eligible dependents will be continued through the month of January, 1991.
>
> 5. The Company will extend a separation benefit in the amount of (64) sixty-four hours at straight time wages.

After December 20, without any hiatus, the business was operated by Respondent. On January 2, 1991, the Union sent a letter to Dwyer, care of Respondent, in which it requests recognition for the unit employees and asks to begin bargaining for a collective-bargaining agreement. The letter was received by Respondent on January 7.

C. *Was the Respondent a Successor Employer on January 7?*

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court reaffirmed and clarified its holding and analysis in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), which defined the obligation of successor employers to bargain with unions that represent the employers of their predecessors. The successor employer,

Fall River, operated a dyeing and finishing plant. Its predecessor, Sterlingwale, had used two types of dyeing, "commission" and "converting," but Fall River engaged exclusively in commission dyeing, which had accounted for 30 to 40 percent of Sterlingwale's business. Fall River purchased Sterlingwale's plant, real property, and equipment on the open market. Of its initial workforce, 36 of 55 employees had been employed by Sterlingwale, and 8 of 12 supervisors had been supervisors of Sterlingwale. Sterlingwale went out of business in late summer of 1982, and Fall River began operating in September 1982, but did not reach capacity until April 1983.

The Court stated that in determining whether a new company is a successor, the approach

> which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co. v. NLRB*, 414 U.S., at 184. Hence, the focus is on whether there is "substantial continuity between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." [*Fall River*, supra at 43.]

The Court further stated that:

> In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as essentially unaltered." See *Golden State Bottling Co.*, 414 U.S., at 184; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (CA9 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest. See *Golden State Bottling Co.*, 414 U.S. at 184. [*Fall River*, supra at 43-44.]

Applying this test, the Court found that Fall River was a successor to Sterlingwale. The Court stated:

> Petitioner acquired most of Sterlingwale's real property, its machinery and equipment, and much of its inventory and materials. It introduced no new product line. Of particular significance is the fact that, from the perspective of the employees, their jobs did not change. Although petitioner abandoned converting dyeing in exclusive favor of commission dyeing, this change did not alter the essential nature of the employees' jobs, because both types of dyeing involved the same production process. The job classifications of petitioner were the same as those of Sterlingwale; petitioner's employees worked on the same machines under the direction of supervisors most of whom were former supervisors of Sterlingwale. The record, in fact, is clear that petitioner acquired Sterlingwale's

> assets with the express purpose of taking advantage of its predecessor's work force. [Id. at 44.]

In making its determination, the Court did not find the 7-month hiatus between the two companies' operations to preclude successorship because other factors indicated a substantial continuity. The Court also did not rely on Fall River's purchase of Sterlingwale's assets on the open market or various differences between the two enterprises, such as Fall River's reduced size, changes in marketing and sales, and failure to assume Sterlingwale's liabilities or trade name. The Court also upheld the Board's rule which fixes the successor's bargaining obligation at the time that it has hired a "substantial and representative complement" of employees.

In *Eastone of Ohio, Inc.*, 277 NLRB 1652, 1653 (1986), the Board listed the following criteria for determining successorship status: (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) product or service.

Applying the foregoing criteria to the facts of record leaves no doubt that the Respondent is a successor to the involved Mack branch. Pursuant to its agreement with Mack, Respondent purchased all existing furniture, fixtures, shop supplies, machines, and tools used at the involved facility. It purchased a little more than a third of the existing parts inventory. It also purchased a flat bed truck from Mack. Respondent bought three delivery trucks from another source to develop its parts business, something Mack did not attempt. Of the some 150 new trucks and 200 used trucks Mack had for sale at the

facility, Respondent purchased about 5 of each. Respondent purchased all real property involved. Under the distributorship portion of the agreement, Mack assigned Respondent an exclusive dealership territory that was the same as the territory formally served by the factory branch.

Mack primarily engaged in fleet sales of new and used trucks, with attendant parts, maintenance, and service sales at the Allentown branch. Respondent continues to sell new and used trucks at the facility, although it does not engage in fleet sales of trucks. The fleet sales business was shifted to other Mack branches. Because of this shift the gross revenues of Respondent are substantially less than that of the branch, about $9 million annually for Respondent compared to $90-100 million annually for the branch. Respondent hopes to sell about 90 trucks annually compared with sales of about 2400 trucks for the branch. Most significantly for the purposes of this analysis however, Respondent continues to provide service, maintenance, and parts for new and used trucks to many of the customers formerly served by Mack.

The difference in scale of the truck sales business between Mack and Respondent is not mirrored in the business done by the involved bargaining unit employees in service and parts sales. Respondent began business with about two thirds of the employees in the bargaining unit, all of whom perform the same work, using the same equipment as they did with Mack. At the time it ceased operations on December 20, 1990, Mack employed 32 service mechanics, 11 parts employees, a shop clerk, and a janitor. By January 1, 1991, Respondent employed 23

mechanics, 7 parts employees, a computer operator (formerly the shop clerk), and a janitor. All of these employees had been bargaining unit employees of Mack at the date it ceased operations.

Management personnel working at the branch for Mack became the management for Respondent, with the exception of the parts manager and a newly created position of director of modifications center. Most of the service employees work under the same management team of Service Manager David Worth, Foreman Christ, and Night Shift Supervisor Grimm. Respondent also hired two new truck salesmen from the former Mack work force and hired one new person in this position as well as a new parts salesman. Four clerical employees of Mack were hired by Respondent to fill similar positions in the new operation.

Respondent completed unfinished repair and service work booked with Mack and not completed by December 20. With respect to service and maintenance customers, Respondent continues to serve many of the same fleet and individual customers formally served by the Mack branch, losing one fleet to Mack and adding a new fleet not previously served by Mack.

With respect to differences between Respondent's operation and that of Mack in the service and maintenance area, Dwyer pointed out that its modifications center offers and provides value added extras to new truck customers that the branch did not provide to any significant degree. This new work accounts for about 30 percent of the Respondent's current volume of business. The Respondent is also trying to develop new business in

the repair and maintenance of fire fighting equipment. It now devotes 11 of its 18 repair bays to these ventures whereas Mack devoted 2 or 3 bays to similar work. Although Mack, using the services of its bargaining unit employees, performed some modification work, it farmed out or subcontracted most of this type work to another company. However, the involved employees had performed at one time or the other, virtually all the modifications now provided by Respondent. Mack also advertised that its branch offered such modification services. When Respondent began business, it assigned one leadman and five or six employees to this work. These were former Mack bargaining unit employees. As the work has grown, employees have been hired to perform this work and/or existing employees have been shifted to this work, which accounted for as many as 12 employees during a busy period in March 1991. It has purchased some specialty welding equipment and other equipment for its modifications center. Respondent purchased computers and computerized its operation. As noted above, all other equipment and machinery used was formerly Mack machinery and equipment and all other work performed by the parts and service employees is exactly as it had been with Mack.

In conclusion, from the perspective of Respondent's service and parts employees, very little changed when their employment shifted from Mack to Respondent. They work in the same building, using the same equipment, performing the same work for many of the same customers, working the same hours and shifts under virtually the same supervision as was the case in their employment with Mack. The change in the scale of the

operation was not dramatic insofar as they are concerned, and the change in the direction of the business to stress modification work is no more of a change than was the change in the dyeing process used in *Fall River*, supra. The involved employees are certainly a representative complement of the former bargaining unit as virtually all the Respondent's service and parts employees as of January 1991 were former bargaining unit members. Respondent's operation in January was relatively full scale and no dramatic increase in business or change in direction of business was foreseen or has occurred that would make the complement of employees hired as of that date less than representative.

Accordingly, I find that Respondent was a successor employer to the Allentown Mack branch with respect to the bargaining unit employees represented by the Union and that it was legally obligated to recognize and bargain with the Union, unless it can show that it had a good-faith reasonable doubt of the Union's majority status sufficient to rebut the presumption of majority status enjoyed by the Union at the time the request for recognition was made.

D. Did Respondent Have a Good-Faith Reasonable Doubt as to the Union's Majority Status Among its Involved Employees?

As noted above, the Union made its request for recognition by letter to Respondent dated January 2, 1991, and received by Respondent on January 7. There was no

other communication between the parties, until Respondent replied by letter dated January 25, 1991. This letter, received by the Union on January 31, reads as follows:

> At least until further investigation, the Company must decline to enter into bargaining because:
>
> 1. It is not a successor to Mack Trucks, Inc. (Mack) The Company purchased certain assets belonging to Mack for cash, and acquired part, but not all, of the business carried on by Mack. The purchase documents specifically disclaim successorship. The Company is completely independent, and none of its stock is owned by Mack.
>
> With respect to your representation of Mack employees, we understand that it ceased upon settlement of the effect of Mack's ceasing and terminating its business at the Allentown Branch of Mack. The Union agreed that the collective-bargaining agreement became null and void upon completion of a settlement including severance pay.
>
> 2. There is a good faith doubt as to support of the Union among the employees hired by the Company. Objective evidence has convinced the Company's management that a majority of its hourly employees do not desire to be represented by the Union.
>
> In order to avoid possible protracted and unproductive dispute over this issue, the Company has arranged for an independent poll by secret ballot of its hourly employees to be conducted under guidelines prescribed by the National labor Relations Board. The poll will be taken on February 8, 1991.

> We shall await the results of the poll before communicating further. I am sure that you will agree that this method of proceeding respects the wishes of the employees, a central policy of the National Labor Relations Act.

The poll was taken and the results sent to the Union by Father Joseph Czaus, a Catholic priest who conducted the poll. His letter reads:

> The results of the poll of employees of Allentown Mack Sales and Service, Inc, conducted on February 8, 1991, are as follows:
>
> 13 employees voted I do want to be represented for purposes of collective bargaining by Automobile & Body Builders Local No. 724, International Association of Machinists and Aerospace Workers.
>
> 19 employees voted I do not want to be represented for purposes of collective bargaining by Automobile & Body Builders Local No. 724, International Association of Machinists and Aerospace Workers.
>
> As an independent third party, I witnessed the poll, collected the ballots, and have verified the results.

On February 12, 1991, the Union responded to the poll by a letter to Respondent which stated:

> In response to the letter received from Father Joseph Czaus concerning the poll of Allentown Mack employees, Local 724 does not recognize this poll or the results of said poll.
>
> Local 724 will continue whatever legal action is necessary to see that Allentown Mack complies with the labor laws.

Other than the communications above noted, there has been no communication between the Union and Respondent.

The poll, which will be discussed in more detail below, does give strong support to Respondent's position that the Union did not enjoy majority status and that it was not obligated to recognize and bargain with the Union. However, before it can rely on the results of the poll, it must show that it had a good-faith reasonable doubt, based upon objective considerations, of the continuing majority status of the Union before conducting the poll. This reasonable doubt must be based on sufficient objective considerations to justify withdrawal of recognition from and incumbent union and must have been formed in an atmosphere free of any unfair labor practices. *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989).

Respondent cannot rely upon the Union's agreement which terminated the collective-bargaining agreement with Mack as of December 20, 1990. This agreement did not affect the Union's rebuttable presumption of majority status and did not amount to a waiver of the Union's rights in this regard. *Bay Area Mack*, 293 NLRB 125, 128 at fns. 11 & 12 (1989). Moreover, Respondent was on notice that the Union expected to be recognized by the statements of James Walsh made at the effects bargaining session of December 6. Likewise, the lack of a successorship clause in the Mack-Union collective-bargaining agreement cannot affect the Union's rights which arise under the Act and not as a result of contract. The lack of such a clause does not constitute a knowing waiver of these rights.

With respect to labor relations, the document which effected the purchase of the Allentown Mack branch by Respondent provides in its paragraph 14:

> No provision of this Memorandum or any other agreement by and between Mack and Buyer shall require Buyer to recognize, assume, or be bound by any existing labor agreement of Mack. Buyer shall have no obligation, and Mack will indemnify Buyer, with respect to any and all claims and liabilities arising under said labor agreements or from Mack's employment relationship with the Mack employees of the Branch. The provisions of this paragraph fourteen shall survive the closing.

This agreement, which does not include the Union as a party, cannot be found binding on the Union, and does not bear on the issue of whether Respondent has an objective reasonable doubt as to the Union's majority status.

The primary evidence relied upon by Respondent to meet its burden under the reasonable doubt standard consists of statements made by bargaining unit employees to management which Respondent interprets as showing employee dissatisfaction with the Union. These statements were made either directly to Dwyer over a period of time or were made to his service manager, Worth and his parts manager, Hamershock, while they were interviewing Mack employees for positions with Respondent. The antiunion comments made to the supervisors were reported to Dwyer. Both Worth and Hamershock testified that the comments about the Union were made to them without prompting on their part. I do not find that they asked the union sympathies of the job

applicants, but I do believe the testimony of both employees Mike Ridgick and Ronald Mohr that they were told during their interviews that the new company would be nonunion. Thus, I feel that the statements made to Worth and Hamershock are somewhat tainted as it is likely that a job applicant will say whatever he believes the prospective employer wants to hear. See *Phoenix Pipe & Tube Co.*, 302 NLRB 122 fn. 2 (1991). Similarly, during the period just prior to December 20, if an employee asked whether the new business would be union or not, Dwyer would answer that it would not. He could not remember being specifically asked this by any employee, though he was frequently asked by business associates and customers.

The statements and comments upon which Dwyer based his good-faith doubt of majority status are as follows:

In 1989, before the renewal of the last collective-bargaining agreement, bargaining unit member Mike Ridgick asked him what Mack could offer that the Union could not, noting there had been a number of decertifications at Mack facilities and wanting to know what he could do in this regard.[5] Dwyer responded he could not give him information about this and he should contact his counterparts at other Mack facilities.

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[5] On cross-examination, Dwyer was uncertain whether this conversation took place in 1989 or in 1986, the year the previous collective-bargaining agreement was negotiated. I believe the best evidence would place the date of this conversation in 1986, as Ridgick was assistant parts manager in 1989 and not a member of the bargaining unit.

Ridgick was interviewed for a position with the Respondent. Although he was a supervisor with Mack at the time he was interviewed, the position he was applying for would be a bargaining unit position. He was interviewed by Respondent's new parts manager, Hamershock. According to Hamershock, he mentioned nothing about the Union, but Ridgick offered that as long as the new company would treat them right, there was no need for a Union. Ridgick admitted making this comment but said it was in response to being told by Hamershock that the new company would be non-union. I find Ridgick's testimony as to the reason for making the comment more plausible and credit it over the testimony of Hamershock.

I consider the 1986 conversation between Dwyer and Ridgick to be too remote to properly judge Ridgick's union sympathies in early 1991. The statement he made to Hamershock also tends to detract from his earlier expression of dissatisfaction. The later statement is at best equivocal and amounts to nothing more than a noncommital acceptance of the conditions of the job being offered. As Ridgick was a member of management at the time he made the statement, I would find it hard to believe that he would express any prounion sentiment during the job interview. The comment he did make is certainly not the expression of pleasure that one would expect if Ridgick wanted the Union decertified as indicated in his earlier conversation with Dwyer. I cannot find that this 1990 comment made during the job interview would support an objective reasonable doubt of majority status.

In either 1986 or 1989, Dwyer had a conversation with a long time bargaining unit employee, Bill Wendling, who retired at some date before Respondent purchased the Allentown Mack branch. Wendling told him he wished he could be in management because it had a better retirement package. This statement could only be interpreted as expressing Wendling's desire for a benefit which management did not afford bargaining unit members. By no stretch of the imagination could it be said to be clear expression of a desire to end his representation by the Union. I can not find this statement even remotely supports Respondent's asserted good-faith doubt.

Again, in either 1986 or 1989, Dwyer had a conversation with bargaining unit member Pete McArthur wherein McArthur asked him for information about decertification. Dwyer referred him to his counterparts at other branches of Mack. Not only do I find this conversation remote to the timeframe in question, McArthur was not hired by Respondent and his sentiments made no difference in determining whether the Union was supported by a majority of Respondent's employees.

In July 1990, when the WARN letter was prepared, Dwyer held an employee meeting and read the letter to the employees. After this meeting, a parts department bargaining unit employee and union steward, Dennis Wehr, told him that if Dwyer was elected principal of a new company, that "we didn't have to have a union, because we didn't need one." Wehr was hired by Respondent in December, but quit on January 23, 1991. I believe that Wehr's statement would properly cause an employer to doubt this employee's support for the Union. However, as Wehr quit his employment with Respondent before it

replied to the Union's request for recognition, I do not believe it could properly count this person in its determination of whether a majority of its employees supported the Union.

In December, a mechanic who works in the fire department, Rusty Hoffman, told Dwyer that if the new company was going to be union that he was not interested in working because he did not want to work in a union shop. In his interview with Worth for a job with Respondent, Hoffman said he would vote out the Union and would try to find another job if he had to work with the Union. I believe that at least Hoffman's comment to Dwyer could be used to support Respondent's good-faith doubt.

During his job interview with Worth, employee Joe McKilvie asked him if there was going to be a Union in the new company. Worth replied that at that time he did not know, to which McKilvie responded that he was against the Union and "we would work better without one." I believe this comment is strong enough indication of antiunion sentiment to be used by Respondent, even though given in the context of an interview.

In his job interview, employee Milt Solt offered that he did not feel comfortable with the Union and thought it was a waste of $35 a month. This statement is not a clear expression of a desire not to be represented and is the type statement which I believe is weakened because of the context in which it was given.

Interviewee Dennis Marsh said he was not being represented for the $35 he was paying. Although this statement does express dissatisfaction with the Union, it

certainly does not amount to a statement that Marsh does not want to be represented by the Union. It seems more an expression of a desire for better representation than one for no representation at all.

Randy Zoltack, who was hired in February, before the poll, told Hamershock the Union was a waste of $35. As Zoltack was hired after the January 25 reply to the Union, his feelings could not have been part of Respondent's good-faith doubt as of that date.

During his job interview, employee Tim Frank mentioned to Worth that "he didn't feel that he wanted to work with the Union now," or "that he would rather not have the Union there." Although Worth's memory of this employee's statements was less than strong, I will credit the testimony and thus agree with Respondent's position that Frank's statement contributed to its asserted good-faith doubt.

During their job interviews with Worth, employees Scot Murphy and Kermit Bloch mentioned they did not want the Union. Dwyer testified that on a number of unspecified occasions after Murphy was hired, Murphy expressed his dissatisfaction with the Union and the dues he was paying. Bloch, who worked on the night shift, told Worth that the entire night shift did not want the Union. There were five or six employees on the night shift at the time. I cannot accept Bloch's representations with respect to the other night shift employees for a variety of reasons. Bloch did not testify and thus could not explain how he formed his opinion about the views of his fellow employees. There is no showing that they made independent representations about their union sympathies to

Respondent and they did not testify in this proceeding. See *Texas Petrochemicals Corp.*, supra, 296 NLRB 1057 (1989). I believe, however, the Respondent can rely on the statements of these two employees as indicating their desire not to be represented by the Union.

Hamershock testified that when interviewing employee David Baker, Baker asked, "What are you going to do about the Union?" Hamershock replied, "That is totally up to the people, I don't know." Baker then said, "That is good because as far as I am concerned, I have no use for it." I believe Respondent should be allowed to use this statement as evidence of its asserted good-faith doubt.

To this point, I find that six employees gave Respondent statements which could be used as objective considerations supporting a good-faith reasonable doubt as to continued majority status by the Union.[6] Even if one counts the statement of employee Milt Solt in this category, which is questionable, only 7 of 32, or roughly 20 percent of the involved employees had expressed sufficient dissatisfaction to support Respondent's position. I cannot find that this level of expressed dissatisfaction constitutes an objective reasonable doubt of union majority support among the unit employees sufficient for a lawful withdrawal of recognition and thus, the conducting of a lawful

[6] These employees are Rusty Hoffman, Joe McKilvie, Tim Frank, Scott Murphy, Kermit Block, and David Baker.

employee poll. *Texas Petrochemicals*, supra; *Hajoca Corp.*, 291 NLRB 104 (1988).[7]

Thus I find crucial to the Respondent's position the last conversation upon which it relies. In December, prior to the interview process, Dwyer and employee and union steward for the service employees, Ron Mohr, engaged in a conversation in which the Union was discussed. Dwyer remembers it taking place in the shop and beginning by Dwyer asking how things were going. He said that Mohr told him that with a new company, if a vote was taken, the Union would lose and that it was his feeling that the employees did not want a union. Dwyer replied that it was up to the employees and he would go either way.[8]

[7] I likewise doubt that it would satisfy the somewhat lesser standard untilized as a prerequisite for a lawful employee poll by three Federal Circuit courts that have rejected the Board's standard. *Mingtree Restaurant v. NLRB*, 736 F.2d 1295 (9th Cir.1984); *Thomas Industries v. NLRB*, 687 F.2d 863 (6th Cir.1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir.1981). These courts have held that an employer may poll its employees to determine their union sentiment if the employer has substantial, objective evidence of loss of union support, even if that evidence is insufficient in itself to justify withdrawal of recognition. As this standard is not the standard used by the Board, and as I am bound to follow Board law, the evidence will not be further discussed in relation to the courts' standard.

[8] Michael Walsh testified that at a meeting of 29 or 30 of the Mack bargaining unit members on December 16, 1990, some 25 signed authorization cards selecting the Union as their bargaining representative. Of course, on that date, the Respondent was not in business. More importantly, the Union never informed Respondent that it was in possession of these cards and never offered to show them to Respondent or an independent third party to verify majority status. In a similar vein, Walsh testified that most of the unit employees of

Mohr testified that in December, prior to the change in ownership, he was called into Dwyer's office and they had a brief conversation about the Union. Dwyer asked him how things were going in the shop, and Mohr replied they were all right. Dwyer then asked him how he felt about the Union. Mohr said he could work with or without the Union; he was there to do his job. Dwyer said that he too could work either way, with or without the Union. It would be up to the men. He asked how the other men felt about the Union and Mohr said he could not speak for the other employees.

Mohr was interviewed for a position with Respondent by Worth who told him what Respondent had to offer by way of wages and benefits, and that it would be a nonunion shop.

Respondent strongly relies on the statement made by Mohr to Dwyer. It urges and I accept that that the version of the statement given by Dwyer should be credited. As Dwyer testified after Mohr and his version of the conversation was materially different, I believe General Counsel had an obligation to call Mohr to comment on Dwyer's testimony in this regard. This is especially so as Mohr mentioned in his testimony having other conversations with Dwyer at about the same time as the one he

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Respondent continued to pay union dues, albeit drastically reduced dues, after Respondent began business. Respondent was not in a position to know whether dues were being paid or not, and was not informed by the Union that dues were in fact being paid. As these facts, which may have had a bearing on the matter of Respondent's good-faith doubt were they known by it, were never communicated to Respondent, I do not believe they have any relevance on this issue.

described. Additionally, Dwyer appeared entirely credible on this point.

Should Respondent be allowed to rely on Mohr's opinion? As opposed to Bloch who offered the opinion that the night shift employees did not support the Union, Mohr, as union steward, was arguably in a position to know the sentiments of the service employees in the bargaining unit in this regard. However, there is no evidence with respect to how he gained this knowledge, or whether he was speaking about a large majority of the service employees being dissatisfied with the Union or a small majority. Moreover, he was referring to the existing service employee members of the Mack bargaining unit composed of 32 employees, whereas the Respondent hired only 23 of these men. Certainly the composition of the complement of employees hired would bear on whether this group did or did not support the Union. He also was not in a position to speak for the 11 parts employees of Mack or the 7 parts employees hired by Respondent. Mohr himself did not indicate personal dissatisfaction with the Union.

Given the almost off-the-cuff nature of the statement and the Board's historical treatment of unverified assertions by an employee about other employees' sentiments, I do not find that Mohr's statements provides sufficient basis, even when considered with the other employee statements relied upon, to meet the Board's objective reasonable doubt standard for withdrawal of recognition or for polling employees. *Texas Petrochemicals*, supra; *Westbrook Bowl*, 293 NLRB 1000 (1989); *KEZI-TV*, 286

NLRB 1396 (1987). Accordingly, I find that the Respondent unlawfully polled its employees about their continued support for the Union, because it did not have the prerequisite reasonable doubt, based on objective considerations, about the Union's continued majority status. Consistent with this finding, I find that the Respondent cannot rely on the results of the poll as an objective consideration, because the poll itself was an unfair labor practice, establishing an unlawful context for withdrawal of recognition. *Texas Petrochemicals*, supra. Thus, I find that Respondent's refusal to extend recognition and bargain with the Union within a reasonable time on and after receipt of the Union's request on January 7, 1991, violated Section 8(a)(5) and (1) of the Act. I also find that by conducting the poll, Respondent violated Section 8(a)(5) and (1) of the Act.

E. Did the Poll Taken by Respondent Independently Constitute a Violation of the Act?

The complaint alleges that Respondent, on February 8, 1991, acting through Robert Dwyer, unlawfully interrogated its employees regarding their union membership and sympathies. The allegation, though perhaps vaguely drawn, must refer to the employee poll taken on February 8, because Dwyer did not personally interrogate anyone about anything on that date according to the evidence of record. Therefore, I will discuss the evidence relating to the poll to determine if its taking by Respondent violated the Act independently of the violation found in the preceding section of this decision.

After receipt of the January 2 letter requesting recognition and following his response of January 25, in accordance with his reply, Dwyer posted a notice in the Allentown facility that a poll regarding union preference would be taken. This notice reads as follows:

> The International Association of Machinists and Aerospace Workers Local #724 has demanded to be the exclusive bargaining agent for all the shop maintenance employees, shop clerks, and partsmen.
>
> The Company, Allentown Mack Sales and Service, Inc. has arranged for an independent poll to be conducted by secret ballot under the guidelines prescribed by the National Labor Relations Board.
>
> The purpose of the poll is to determine the wishes of our employees, with respect to representation for collective bargaining.

On February 8, the date of the poll, Dwyer held two meetings with employees. In each he read a statement which said:

> A poll of our employees will be conducted on the supervision of Father Czaus this afternoon. The purpose of this poll is to ascertain whether the International Association of Machinists and Aerospace Workers, Local Union No. 724, actually represents the majority of the company's employees covered by the National Labor Relations Act.
>
> We want to assure you that no reprisals will be taken against any employee regardless of how he votes, or the outcome of the poll.

> The poll will be taken by secret ballot, and only Father Czaus will see the ballots. He will simply report the results to us, and those results will be posted and communicated to the Union.
>
> That is all I have to say about the poll. If you have any questions about the polling procedure, please ask Father Czaus after I have left the room.

Father Czaus conducted the poll in which all employees who would be in the bargaining unit voted. He then took the ballots, left the premises, and later advised the Company and the Union of the results.

Where an employer has demonstrated a reasonable doubt about a union's continued majority status, the Board has generally accepted the adequacy of the procedural safeguards for employer-conducted polls of employees set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), i.e., (1) the purpose of the poll is to determine whether the union enjoys majority support; (2) the purpose is communicated to the employees; (3) assurances against reprisals are given; (4) the employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

If one assumes for the purposes of this discussion that Respondent did have sufficient objective grounds for a good-faith doubt of the continuing majority status of the Union, then I believe that the poll was conducted within the guidelines of *Struksnes*. Had it had such a good-faith doubt, then it would not have committed any unfair labor practices to the date of the poll and there is virtually no evidence that the poll was conducted in a

coercive atmosphere. General Counsel would have me find that regardless of Respondent's good-faith doubt, the poll was conducted in an atmosphere tainted by Respondent's refusal to recognize the Union on January 7 and by its refusal to bargain with the Union prior to the poll. I disagree. I believe Respondent's January 25, 1991 response to the Union's January 2 request was reasonably timely and does not by itself amount to a refusal to recognize and bargain with the Union. By its very terms, it merely postpones that decision until the results of the employee poll are known.

As noted in the fact findings above, the employees were informed of the purpose of the poll, the purpose was permissible, assurances against reprisals were given, and the poll was by secret ballot conducted by an independent third party.

In *Texas Petrochemicals*, supra, 296 NLRB 1057 (1989), the Board added a new requirement for such polls. In that case, the Board held that the union must be given advance notice of the time and place of the poll. The Union received notice that the poll would be taken on February 8, 1991, when, on January 31, it received Respondent's letter of January 25. Although the specific time and place of the poll was not stated, and perhaps on January 25, not known to Respondent, the Union was on notice of the intention to take the poll and its date. I believe that the Union had at least the minimal responsibility to inquire as to the time and place, and if it had objections to them, to voice such objections. In the absence of such objections, I cannot find that the purpose of requiring advance notice has been violated. Similarly, on brief, the Union raises a number of objections to the

poll, questioning the integrity of Father Czaus and the appropriateness of the location of the poll. Absent any inquiry by it about how the poll was to be taken and voicing timely objection, I do not find its late formed objections to be well taken. This is especially true because there is nothing in the evidence given by the employees who participated in the poll to indicate that there was anything questionable or coercive about the poll.

Therefore I find that the poll meets the Board's guidelines and the manner in which it was taken does not violate the Act. However, as I have heretofore found that the taking of the poll was unlawful and unavailing to the Respondent, this point is relatively moot.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All shop employees, shop clerks and partsmen employed by Respondent at its Allentown, Pennsylvania facility, excluding office clerical employees, drivers, salesmen, and watchmen and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing on or after January 7, 1991, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the

appropriate unit, and by taking an employee poll to verify the continuing majority status of the Union, all without sufficient objective considerations on which the Respondent could base a reasonable doubt about the Union's continued majority status, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in other unfair labor practices as alleged in the complaint.

Remedy

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

It is recommended that Respondent be ordered to extend recognition to, and upon request, bargain with the Union as the exclusive collective-bargaining representative for its employees in the above-described unit, over the terms and conditions of employment of these employees and, if agreement is reached, embody such agreement in a written contract.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and

ORDER

The Respondent, Allentown Mack Sales & Service, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL – CIO as the exclusive collective-bargaining representative of the employees in the appropriate unit, and taking an employee poll to verify the continuing majority status of the Union, without sufficient objective considerations on which it could base a reasonable doubt about the Union's continued majority status.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Extend recognition to and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All shop employees, shop clerk and partsmen employed by Respondent at its Allentown, PA

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recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

> facility, excluding office clerical employees, drivers, salesmen, and watchmen and supervisors as defined in the Act.

(b) Post at its Allentown, Pennsylvania facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Local Lodge #724, International Association of Machinists

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and Aerospace Workers, AFL – CIO as the exclusive collective-bargaining representative of our employees in the unit described below, and WE WILL NOT take an employee poll to verify the continuing majority status of the Union, without sufficient objective considerations on which we could base a reasonable doubt about the Union's continued majority status.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL extend recognition to and, on request, bargain in good faith with the Union as the exclusive representative of our employees in the following appropriate unit over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All shop employees, shop clerks and partsmen employed by us at our Allentown, Pennsylvania facility, excluding office clerical employees, drivers, salesmen, and watchmen and supervisors as defined in the Act.

ALLENTOWN MACK SALES & SERVICE, INC.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1272 **September Term, 1996**

Allentown Mack Sales and Service, Inc., (Filed Sep. 13, 1996)

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams and Sentelle would grant the suggestion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1272 **September Term, 1996**

Allentown Mack Sales and Service, Inc., (Filed Sep. 13, 1996)

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Sentelle, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, filed July 1, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1272 **September Term, 1996**

Allentown Mack Sales and Service, Inc., (Filed Oct. 24, 1996)

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Sentelle, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of petitioner's motion for stay of mandate, the response thereto and of the reply, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THIS COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A Bonner
Robert A Bonner
Deputy Clerk
